The Specifics. J. D. Davis, the decedent, was a domiciliary of Tennessee when he met Dorothy L. Davis, a Florida domiciliary, in 1989. They married in Florida in 1990; Mr. Davis was 75 years of age, Ms. Davis was 66. (App. A-2)

Both Mr. and Ms. Davis had been married previously, both had children from their previous marriages, both were in good health, and both were financially comfortable. (App. A-2) After their marriage, Mr. Davis remained a Tennessee domiciliary and Ms. Davis remained a Florida domiciliary. Tennessee law recognizes that a married couple can have separate domiciles. *Younger*, 138 S.W.2d at 445.

The Davises entered into a reciprocal antenuptial agreement in Florida. The agreement recorded their "desire that all property now owned or hereafter acquired by each of them shall, for testamentary disposition, be free from any claim of the other that may arise by reason of their contemplated marriage." Further, "[e]ach party during his or her lifetime shall keep and retain sole ownership, control and enjoyment of all his or her property, real and personal, free and clear of any claim of the other." (App. F-1)

In reflection of this overarching philosophy of reciprocal property assignment, both Mr. and Ms. Davis "waive[d] and release[d] any rights as surviving spouse to elect to take against the other's will, whether heretofore or hereafter made." They also reciprocally waived and released all marital rights to each other's property. (App. F-1 through F-2) The Court of Appeals acknowledged that "Florida law is the only law specifically referenced in the agreement," and found that nothing in the record suggested that either

Mr. or Ms. Davis intended that the agreement be construed under Tennessee law. (App. A-6)

Mr. Davis died in Florida on May 9, 2002, and his Will, which referenced the antenuptial agreement, was admitted to probate in Tennessee on May 15, 2002. (App. A-3) In December 2002, in contravention of the antenuptial agreement into which she had entered, Ms. Davis filed petitions for elective share, homestead, exempt property, and a year's support allowance against the estate of Mr. Davis. (App. A-3) The estate resisted, moving for summary judgment and enforcement of the antenuptial agreement.

The probate court granted summary judgment to the estate, finding that under Tennessee's choice-of-law provisions, Florida law applied to the agreement. Under Florida law, the agreement was valid and enforceable. (App. B-1 through B-2)

On appeal, the Court of Appeals agreed that under Tennessee's choice-of-law provisions, Florida law applied to the agreement. (App. A-6) After extensive analysis of both Florida statutory and case law, including statutory changes in Florida law addressed to this issue, the Court of Appeals concluded that the Florida legislature specifically amended its law to give effect to antenuptial agreements in the context of probate, even in the absence of disclosure of assets. (App. A-11)

Under Tennessee law, antenuptial agreements are only valid with adequate asset disclosure. *Randolph v. Randolph*, 937 S.W.2d 815 (Tenn. 1996). Even though Tennessee's choice-of-law rules dictated application of Florida law, the Court of Appeals trumped Tennessee's choice-of-law principles and refused to give effect to

otherwise-applicable Florida law. Application of Florida law would violate "a substantially important public policy of the State of Tennessee." (App. A-15) Without further analysis of choice-of-law principles and even though Tennessee's choice-of-law provisions called for application of Florida law, the Court of Appeals construed the agreement under Tennessee's substantive law. (App. A-15)

The result of the Court of Appeals' decision is that it improperly "invoke[d] its own public policy to affect the result on the merits." WEINTRAUB, *supra*, at 108. This practice of using "public policy" doctrine to "undercut" content-disfavored results from the neutral application of choice-of-law doctrine has been described as "achieving the desired effect by a misleading route," Paulsen & Sovern, *supra*, 56 COLUM. L. REV. at 996, and has been condemned by commentators for years. *Id.* at 1016 (If "public policy doctrine substitutes for choice of law," a court should address itself "directly to questions concerning choice of law policy").

REASONS FOR GRANTING THE PETITION

THE ISSUES ARE OF NATIONAL IMPORTANCE AND THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR ESTABLISHING SOME STANDARDS IN A FIELD SUFFERING FROM LONGSTANDING NEGLECT AND DOCTRINAL DISARRAY

This Court should grant review herein either to clarify how FFC considerations enter into the analysis of "public policy" or to conclude, as contended by Dean Kramer, that it is unconstitutional under FFC for a state to refuse "to apply another state's law, otherwise applicable under

forum choice-of-law rules, on the ground that it promotes a policy the forum finds repugnant." Kramer, *supra*, 106 YALE L.J. at 1987. In the alternative, this Court could articulate a decisional-process requirement under FFC, requiring that courts confront and address the question of whether competence to legislate in a particular matter exists, not just determine in a one-dimensional manner whether a law of another state conflicts with the public policy of the forum state.

A. Some Background

As this Court has explained, the "animating purpose" of FFC was to make states "integral parts of a single nation," providing a constitutionally-based enforceable "remedy" across states that "might be demanded as of right, irrespective of the state of its origin." *Baker*, 522 U.S. at 232 (internal cite omitted). FFC, and as implemented by federal law, 28 U.S.C. §1738, "substituted a [constitutional] command for the earlier principles of comity." *Id.*

A fundamental issue posed by FFC analysis – and the one presented herein – deals with the situation when a state has "sufficient contact with the parties or with the facts so that, within the limits of due process, its law may be used in adjudicating a controversy arising between the parties on those facts." The FFC question in such a situation is "[u]nder what circumstances will the use of that state's law nevertheless violate the requirements of full faith and credit?" WEINTRAUB, *supra*, at 619.

The answer to that question requires a sensitive, multi-dimensional consideration not only of the forum's own interests and policies, but also of (i) the forum's

obligations to other states and (ii) to the parties and (iii) of the forum's own limitations as one state among co-equal sovereigns. While states have flexibility in giving effect to their own policies and interests, that flexibility is constrained by the accommodationist requirements of FFC.

B. The Doctrinal Basics

FFC applies to "laws (legislative measures and common law) and to judgments." *Baker*, 522 U.S. at 232. This case deals with FFC's application to the "laws" of Florida, and "command" of FFC that Tennessee adhere to its own choice-of-law rules, which dictate the application of Florida's law to the enforcement of the antenuptial agreement at issue.

Florida's law expressly validates and provides for enforcement of the antenuptial agreement, even if there was no disclosure of assets by the parties. Tennessee's law, while enforcing antenuptial agreements under standard contract doctrine, requires asset disclosure.

In determining what law to apply in its choice-of-law analysis, a forum state has considerable flexibility in determining the relative strength of the interests of the affected states. As part of its choice-of-law analysis, a forum state may take into account its own public policy interests in "determining the *law* applicable to a controversy." *Id.* at 233 & n.6 (emphasis in original). A state may adopt its own law on matters about which it is "competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939). But whether a state is "competent to legislate" is part of the inquiry of choice-of-law analysis, and that inquiry is constitutionally

constrained by FFC principles. *See Phillips Petroleum Co.*, 472 U.S. at 818-19.

In determining what law to apply in its choice-of-law analysis, a forum state must select that law "in a constitutionally permissible manner," which requires the state to "have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co.*, 449 U.S. at 312-13.

The "arbitrar[iness]" prong of *Allstate* encompasses two related federalism-based concerns. First, a state has an obligation as one of many co-equal sovereign states to "respect the laws" of other states. *Phillips Petroleum Co.*, 472 U.S. at 819. Second, a state is "competent to legislate" only about matters in which it has legitimate "state interests" that are created by contacts with the parties or the transaction. The "contacts" that are relevant under FFC analysis differ from those that are relevant under analysis of personal jurisdiction; a state may have sufficient contacts to serve as a forum but still not be competent to apply forum law when that is in conflict with the law of another jurisdiction. *Id.* at 821.

The contacts inquiry in FFC analysis is designed to "delimit spheres of state legislative competence." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988). The nature and extent of "contacts" in FFC analysis are important because they "creat[e] state interests," *id.*, that, at the threshold, allow a state to legislate about a matter and establish a state's "competenc[e] to legislate." *Franchise Tax Bd.*, 538 U.S. at 496. Thus, a state might not be competent to legislate about the substantive law "governing the validity

and effect of contracts," *Sun Oil Co.*, 486 U.S. at 726, if insufficient contacts exist to create "state interests" that make that state competent to legislate.

The "fairness" prong of FFC analysis examines whether application of the law of a specific jurisdiction brings about "unfair surprise or frustration of legitimate expectations." *Allstate*, 449 U.S. at 318 n.24. A particularly important element of the "fairness" analysis is the "expectation of the parties." *Phillips Petroleum Co.*, 472 U.S. at 822.

Thus, there is a constitutional time and place for "public policy" analysis – as part of the choice-of-law analysis. That is the place in which a court can consider the arbitrariness and fairness elements of FFC doctrine, the federalism-driven questions of how the law of one state can appropriately be accommodated to the law of other jurisdictions. This, of necessity, is a multi-dimensional analysis, and the kind of one-dimensional analysis employed by the Court of Appeals under the heading of "public policy" just cannot – methodologically or substantively – deal appropriately with the nuanced issues that arise inherently in the context of FFC analysis.

C. The "Public Policy" Doctrine

As applied by the Court of Appeals herein, the "public policy" doctrine provides that a law of a non-forum state that is otherwise applicable – *e.g.*, a "substantive provision[] . . . governing the validity and effect of contracts," *Sun Oil*, 486 U.S. at 726 – might nonetheless be refused application in a particular circumstance if application of that law is contrary to the public policy of the forum.

This use of the "public policy" doctrine is analytically deficient – anomalous and anachronistic. It is one-dimensional in that it only asks the question of whether the law of a foreign state conflicts with the public policy of the forum state. It does not address and does not provide a methodological vehicle for addressing the pivotal FFC questions – whether, under *Allstate*, application of forum law and disregard of foreign-state law are arbitrary or unfair.

Contemporary choice-of-law analysis, Restatement, Second, Conflict of Laws §6, is designed to identify the competing considerations in determining whether forum law or the law of another state should be applied. That inquiry encompasses the interests and policies of the forum state, as well as the other elements (including FFC considerations) that shape the decision about which law should apply. Invocation of the "public policy" doctrine, without further analysis or reasoning, allows a court to disregard the consequences of its choice-of-law analysis on the basis of the specific content of a foreign jurisdiction's legislation, without further regard to FFC considerations of federalism that constrain the forum state's ability to apply its own rule of law. It does not direct a court's attention to the analytically relevant questions under existing FFC doctrine.

As Professor Weintraub has stated, "[w]hen the forum does have policies that it can fairly impose on nonresidents, the forum should make a functional analysis of the choice-of-law problem, select either forum law or foreign law, and render a decision on the merits." WEINTRAUB, *supra*, at 109.

What the Court of Appeals did in this case is to use the "public policy" doctrine as a vehicle for refusing to apply Florida law, which was otherwise (concededly) applicable under Tennessee's choice-of-law rules, on the ground that application of Florida law "promotes a policy the forum finds repugnant." Kramer, *supra*, 106 YALE L.J. at 1987.

When courts use "public policy" analysis as the Court of Appeals did in this case – not as *part* of a multi-dimensional federalism-sensitive or fairness-sensitive choice-of-law analysis but as an after-the-fact one-dimensional *trumping* of that choice-of-law analysis – then FFC's constitutional principles, as reflected in existing law, get shortchanged.

The Court of Appeals entered into no analysis of the fairness (or unfairness) to the parties that arises from disregarding Florida law; after all, the parties had contemplated that Florida law would govern their agreement. (App. A-6) And the Court of Appeals said nothing about the propriety (*i.e.*, arbitrariness) of applying Tennessee law to defeat a reciprocal contract entered into in Florida that reflected a progressive recognition that couples could maintain their autonomy by retaining separate domiciles (each subject to the rights and responsibilities of their respective state of domicile). For cases restricting the extraterritorial effect of a state's substantive law, see *Home Ins. Co.*, 281 U.S. 397 and *John Hancock Mutual Ins. Co.*, 299 U.S. 178 (each discussed in *Allstate*, 449 U.S. at 309-11).

D. The Problem and Its Implications

For over fifty years, this Court has made it clear that states are not constitutionally free to apply forum law based on their own "public policy" without consideration of FFC principles. In *Hughes v. Fetter*, 341 U.S. 609, 612 (1951), Wisconsin declined to entertain a wrongful death action created by Illinois statute. This Court held that Wisconsin's "public policy" choice must be considered in the context of and balanced with the "strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states."

Fetter held that the Wisconsin policy had to give way since, under the circumstances, it was "forbidden by the national policy of the Full Faith and Credit Clause." *Id.* at 613. While forum states may apply their vision of substantive public policy to some extent, their own vision of their own interests is not the only consideration. Balancing of the interests of one state against the interests of another state may no longer be required under FFC, see *Franchise Tax Bd.*, 538 U.S. at 495-97, but the interests of any single state must be considered in the context of the national interest – the "strong unifying principle embodied in the Full Faith and Credit Clause." And *Fetter* holds that "it is for this Court to choose in each case between the competing public policies involved." *Fetter*, 341 U.S. at 611.

Fetter placed a limit on the scope of a state's authority to use one-dimensional "public policy" analysis as a rationale for defeating claims based on the law of other states. FFC places limits on a state's discretion to disregard and decline to give effect to the substantive law of

other states, but this Court in *Fetter* provided little doctrinal guidance. *See also Broderick*, 294 U.S. at 642-43 (per Brandeis, J.) (holding that a state may not use "public policy" to deny enforcement of claims arising from other states and otherwise within the protection of FFC since "the constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity").

Another line of cases, culminating in *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947), held that the forum state must give effect to the law of the state of incorporation in construing the charter of fraternal benefit societies, even if the law of the state of incorporation violated the forum state's public policy. The bright-line rule is captured by Justice Holmes in *Modern Woodmen of America v. Mixer*, 267 U.S. 544, 551 (1925): "The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law granting the incorporation."

These cases demonstrate that FFC places limits on the ability of a state to apply its "public policy" to defeat claims originating from other states. It is analytically deficient for a court to focus exclusively in a one-dimensional manner on the "public policy" of the forum state in determining whether to accord FFC to the law of another state. Yet that is what the Court of Appeals did in this case.

In *Allstate*, 449 U.S. at 309-13, this Court began the modern process of establishing a framework for considering choice-of-law issues under FFC.

One *Allstate* component addresses a state's authority to exercise its sovereign law-making authority over the matter at hand – its competence to legislate. This arbitrariness component limits the ability of states to project their power extraterritorially to abrogate rights or obligations of parties created by other states in the absence of sufficient contacts with the parties or the transaction that would justify assertion of forum law. *Phillips Petroleum Co.*, 472 U.S. at 821-22.

The other *Allstate* component – the fairness component – focuses on the fairness to the litigants of applying the forum's law. "[E]xpectation of the parties" is an especially important element of the fairness component. *Id.* at 822.

When a court (like the Court of Appeals below) relies exclusively on "public policy" as a basis for disregarding or declining to enforce the law of another state – and particularly when that analysis of "public policy" occurs outside of so as to trump the choice-of-law analysis – the federalism dimensions of FFC receive short shrift. For a state to determine that its public policy can never yield to the law of another state would mean that the public policy "exception would swallow the [choice-of-law] rule," thereby submerging and possibly eviscerating important precepts of federalism embodied in principles underlying FFC. Kramer, *supra*, 106 YALE L.J. at 1970. No opportunity is afforded under the "public policy" doctrine to consider either the arbitrariness or the fairness components of FFC doctrine under *Allstate*. And no case of this Court provides

the guidance needed of how or in what analytical methodological framework the multi-dimensional aspects of FFC doctrine are to be addressed or evaluated.[1]

In short, a doctrine-clarifying decision such as *Allstate* is needed for the "public policy" doctrine. This case provides an excellent vehicle for such a clarification.

E. This Case As a Good Vehicle

This case provides an excellent vehicle for this Court to address the "public policy" doctrine and its proper and properly delimited role in FFC analysis.

Separate Marital Domicile. Failing to give effect to the agreement under Florida law, where Ms. Davis is domiciled, could set back the progressive trend of allowing both spouses the autonomy of maintaining their own and their independent domicile of choice. This case provides an opportunity for this Court to determine whether marital domicile means one thing when a married couple has a

[1] Indeed, the case usually cited for the proposition that a state cannot rely on its own public policy to trump all inconsistent laws from non-forum jurisdictions – an obvious principle of limitation if states must, in some circumstances, give effect to non-forum laws that conflict with substantive policies of the forum state – is a New York case, not a case of this Court. *See Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918) (per Cardozo, J.) (courts should not decline to give effect to non-forum law unless application of the foreign law "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal"). *See* EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 139-40 (3d ed. 2000) (stating that the "public policy exception to the enforcement of rights based on foreign law is to be construed narrowly: fundamental policies of the forum must be offended; mere differences between the law of the forum and of the foreign jurisdiction are not enough" but not referencing a decision of this Court other than *Fetter*).

single domicile and another when the spouses retain their own domiciles.

With respect to both the fairness component of FFC analysis under *Allstate* and the legislative competence (*i.e.*, "arbitrar[iness]") component of that analysis, this case provides an opportunity for the Court to consider the implication of separate marital domiciles on choice-of-law. The issues raised in the case also demonstrate the insufficiency of the one-dimensional "public policy" approach adopted by the Court of Appeals.

Under traditional common-law principles, "the wife's domicile was assigned by operation of law to that of her husband." EUGENE F. SCOLES ET AL., *supra*, at 264-65. In this case, husband and wife maintained separate domiciles. Tennessee law recognizes that husband and wife may maintain separate domiciles. *Younger*, 138 S.W.2d at 455.

Domicile is important because "the law has traditionally identified the state of the [marital] domicile as that state which has the greatest interest in the marital relationship" for choice-of-law purposes. SCOLES ET AL., *supra*, at 229. From the legislative competence perspective, may Tennessee substitute its law for that of Florida, Ms. Davis' domicile, when Ms. Davis has entered into an agreement that is legally valid and enforceable under Florida law?

In a very fundamental way, the Tennessee Court of Appeals' decision disrespects in a highly paternalistic manner the autonomous judgment of Ms. Davis to subject herself to the law of her own self-selected state of domicile (Florida). At the same time, because of Ms. Davis' choice of Florida domicile, the decision of the Court of Appeals projects Tennessee law into Florida to upset a legal regime

that the parties to the agreement sought out and intended to abide by.

(a) The case thus provides an excellent vehicle for considering the "fairness" component of FFC doctrine under *Allstate*.

An "important element" of the *Allstate* FFC "fairness" analysis is the "expectation of the parties." *Phillips Petroleum Co.*, 472 U.S. at 822. In this case, the autonomy of the parties, and especially that of Ms. Davis, are at issue. The Court of Appeals found that neither Mr. nor Ms. Davis expected Tennessee law to apply. (App. A-6) Ms. Davis retained her Florida domicile to be bound by (and privileged by) Florida law. She and Mr. Davis mutually and reciprocally agreed to renounce their interest in each other's assets since both were financially comfortable at the time of their marriage and they each had children to whom they felt an obligation. Under the circumstances, asset disclosure was beside the point (contrary to Ms. Davis' current allegations), and Florida law upon which the couple relied made such disclosure immaterial to the enforcement of the agreement. (Florida law recognizes a duty of asset disclosure for asset assignment agreements between spouses once the marriage has taken place.) (App. E-2 through E-3)

Tennessee law recognizes that antenuptial agreements are to be "interpreted and enforced like any other contracts." *Soloman v. Murrey*, 2002 Tenn. App. LEXIS 734, at *9 (construing Tenn. Code Ann. §36-3-501). Enforcement of the substantive provisions of a contract, as in this case, involves the application of substantive law. *Sun Oil Co.*, 486 U.S. at 726 ("[T]he rules governing the validity and effects of contracts" are "substantive provisions" not "procedural

restrictions"). So Tennessee cannot acquire an "interest" in the enforcement of the contract by an assertion of a "procedural" interest in its enforcement. *Id.* at 722-23.

The Court of Appeals' reliance on the "public policy" doctrine completely ignores this critical fairness element of FFC analysis. The Court of Appeals' decision focused only abstractly and one-dimensionally on the public policy of Tennessee, disregarding entirely the "fairness" analysis that inheres in FFC doctrine.

This contract was made in Florida, where the marriage took place, and the parties counted on its enforcement under Florida law. (App. A-6) Both spouses reciprocally sought protection of their assets for testamentary distribution to their respective children, which principle was honored by the antenuptial agreement and respected under Florida law. Given these circumstances, and especially since one of the parties is dead, application of Tennessee substantive law to undo the contemplation of the parties constitutes after-the-fact unfairness under FFC analysis – "unfair surprise" and "frustration of legitimate expectations as a result of [Tennessee's] choice of its law." *Allstate*, 449 U.S. at 318 n.24. Ms. Davis and eventually her children will be advantaged; the children of Mr. Davis will be disadvantaged. This differential treatment of their respective children was neither intended nor foreseen by the parties to the antenuptial agreement.

(b) This case also provides an excellent vehicle to explore the "arbitrar[iness]" prong of FFC analysis under the *Allstate* framework.

To justify its disregard of Florida law, Tennessee must be "competent to legislate" about the enforceability of the antenuptial agreement. *Sun Oil Co.*, 486 U.S. at 722. This means that Tennessee must have "contacts" with the parties or the contract that "creat[e] state interests" that it can legislate about. *Phillips Petroleum Co.*, 472 U.S. at 821. But Tennessee "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Id.* at 822 (internal cite omitted).

That Mr. Davis was a domiciliary of Tennessee is an insufficient basis to justify application of Tennessee's substantive law. *Id.* at 820 (citing *John Hancock Mut. Life Ins. Co.*, 299 U.S. at 182, and *Home Ins. Co.*, 281 U.S. at 408). By her own choice, Ms. Davis was a Florida domiciliary at the time the agreement was entered into and currently. Tennessee's refusal to give effect to the agreement affects the substantive contractual rights of the parties, *Sun Oil Co.*, 486 U.S. at 726, so Tennessee cannot assert a procedural administration-of-justice interest in enforcement of the antenuptial agreement. *Id.* at 730.

Just how would Tennessee characterize its constitutionally valid interest in disregarding the law of Florida? The Court of Appeals' reliance on the "public policy" doctrine allowed that court to finesse that issue, to avoid articulation or consideration of what that interest is. But it is far from clear that Tennessee has the competency to legislate in such a manner as to protect a marital non-domiciliary by declining to enforce a reciprocal pre-marital agreement, recognized as valid and enforceable under the law of her state of domicile, in the context of probate.

The probate of a will in Tennessee involves an *in rem* proceeding with the estate constituting the *res*. *In re Estate of Barnhill*, 62 S.W.3d 139, 144 (Tenn. 2001). But the real parties at interest in an *in rem* proceeding are the persons or entities whose rights and responsibilities regarding the *res* are subject of adjudication. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

A forum state has a legitimate interest in protecting a person who is a marital domiciliary of that state. A forum state has a legitimate interest in protecting persons injured in that state, *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954), even if they are nonresidents. *Pacific Employers Ins. Co.*, 306 U.S. 493. But a forum state "may not take a transaction with little or no relationship to the forum and apply the law of the forum." *Phillips Petroleum Co.*, 472 U.S. at 821.

Under the terms of the antenuptial agreement herein, entered into in Florida and intended by the parties to be enforced under Florida law, there was "little or no relationship" with Tennessee. Only mutual self-abnegation was called for. No conduct on the part of Ms. Davis, a Florida domiciliary, was contemplated in Tennessee at the time of Mr. Davis' death. Indeed, just the opposite was contemplated.

With respect to "accrual of the right asserted under the contract," that occurred in Florida; only non-action on the part of Ms. Davis was contemplated in Tennessee. Therefore, there is "no occurrence, nothing [to be] done, to which the law of [Tennessee] could apply." *John Hancock Mutual Life Ins. Co.*, 299 U.S. at 182. Tennessee "may not abrogate the rights of parties beyond its borders having

no relation to anything done or to be done within them." *Phillips Petroleum Co.*, 472 U.S. at 822 (quoting *Home Ins. Co.*, 281 U.S. at 410).

Recognition of separate marital domiciles necessarily entails recognition of a marital partner's decision to be bound by the law of her marital domicile – in this case Florida for Ms. Davis. Stated differently, Tennessee is projecting its sovereign authority in a manner that is beyond its proper scope of competency in its paternalistic effort to protect Ms. Davis from herself under the terms of Florida law. *Cf. United States v. Virginia*, 518 U.S. 515 (1996) (State university may not deny women access to "adversative" method of education because some educators believe that such educational methods are not well suited for women students).

In *BMW*, this Court noted the constitutional limits on the ability of a state to act to protect non-domiciliaries; a state can only impose economic sanctions in support of its "interest in protecting its own consumers and its own economy," not to protect the interests of nonresidents. *BMW of North America, Inc.*, 517 U.S. at 572; *accord*, *State Farm Mutual Automobile Ins. Co.*, 538 U.S. at 421-22. Ms. Davis was not domiciled in Tennessee when she was married or when she entered into the antenuptial agreement, and she is not now a Tennessee domiciliary. The state at this point has no contacts with her other than serving as a forum for the adjudication of her claim to a portion of the estate of her late husband. Tennessee, consequently, is not "competent to legislate" about the enforcement of the antenuptial agreement, and Tennessee may not decline to apply Florida law to enforcement of that agreement. Tennessee's disregard of Florida law is,

therefore, "arbitrary" under the FFC standard set forth in *Allstate*.

The contrary decision of the Court of Appeals under the "public policy" doctrine is analytically deficient in that it does not address what are, for FFC purposes, the critical issues. This Court should grant review to clarify and develop the law in this important area.

Nature of Contacts in FFC Context. The plurality in *Allstate* established the importance of "contacts" in FFC analysis. It spoke in terms of "significant" contacts or a "significant aggregation of contacts" that created interests about which the state would be competent to legislate. *Allstate Ins. Co.*, 449 U.S. at 308. The *Allstate* decision also noted the importance of "relevant" contacts. *Id.* at n.10. In his concurrence, Justice Stevens sought to develop the concept of what type of contacts were significant and why. *Id.* at 320. Justice Powell's dissent, however, criticized the plurality because he did not believe that it had "adequately analyze[d] the policies that [significant contact] review must serve." *Id.* at 332.

Despite some further elaboration in *Phillips Petroleum Co.*, noting that "contact" analysis under FFC and under personal jurisdiction differed, there has not been much elaboration of what goes into the FFC "significant contact" review. *Phillips Petroleum Co.*, 472 U.S. at 818-23. The language about "aggregation" of contacts suggests that the "extent" of contacts is important. But, there has not been much development regarding the "nature" of "relevant" contacts.

This inquiry is important because the Court has rejected an approach to FFC that encompasses a balancing of sovereign interests among competing states. *Franchise Tax Bd.*, 538 U.S. at 495-97. Consequently, the focus of inquiry in determining how "to delimit spheres of state legislative competence," *Sun Oil Co.*, 486 U.S. at 727, must be more categorical in character. In *Sun Oil Co.*, the Court drew a categorical distinction between substantive and procedural rules, allowing states to legislate regarding procedural rules (statutes of limitation there). *Id.* at 722-23. To develop this federalism-based "spheres of state legislative competence" analysis, the Court needs to provide more guidance on the "nature" of significant and relevant contacts. As Justice Powell noted in his *Allstate* dissent, "examination of contacts addresses whether 'the state has an interest in the application of its policy in this instance.'" *Allstate Ins. Co.*, 449 U.S. at 334-35 (internal cite omitted).

This is precisely the kind of guidance needed to resolve the issues in this case. The random application of the "public policy" doctrine, as in the Court of Appeals' decision in this case, distracts from the core analytical issues needed to resolve the nuanced FFC questions raised by this case. This Court could develop some categorical rules, analogous to the rule that the law of the state of incorporation controls. In *Modern Woodmen of America*, 267 U.S. at 551, Justice Holmes drew a parallel between membership in a fraternal benefit society and marriage: "The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law granting the incorporation." The Court could conclude that marital domicile

should be accorded comparable status, with assurance that the choice of domicile of each marital partner be respected. That type of rule could control this case.

At this point, the specifics of the Court's guidance are less significant than the need for that guidance. This case provides a rich opportunity for the Court to clarify and develop the law of "significant contacts" in the context of FFC analysis, focusing on the "nature" of relevant contacts and perhaps staking out some bright-line rules analogous to the procedure vs. substance distinction or the state-of-incorporation doctrine for enforcement and interpretation of fraternal benefit society charters. Such guidance is especially needed since the Court has rejected balancing of sovereign interests across states as unworkable.

CONCLUSION

The FFC issues relating to the "public policy" doctrine are emerging and eventually will come to this Court cloaked in highly controversial garb. *See, e.g.*, Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STANFORD J. OF CIVIL RIGHTS & CIVIL LIBERTIES 1 (2005) (Harvard Law School Public Law, Research Paper No. 112, available at http://ssrn.com/abstract=697862). The "public policy" doctrine is in need of doctrinal clarification and development. This case provides an excellent vehicle and context for the development of that process.

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 3, 2004 Session

IN RE: THE ESTATE OF J. D. DAVIS, DECEASED

Direct Appeal from the Circuit Court (Probate Division) for Davidson County No. 02P859 Frank G. Clement, Jr., Judge

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No. M2003-02614-COA-R3-CV

(Filed Sep. 02, 2004)

The probate court awarded summary judgment to Defendants/Appellees upon determining that, under Florida law, the antenuptial agreement entered into by Plaintiff/Appellant and Deceased was valid and enforceable. On appeal, Plaintiff/Appellant argues that the agreement is not enforceable as a violation of Tennessee public policy and by reason of duress. We reverse the award of summary judgment and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and HOLLY M. KIRBY, J., joined.

Overton Thompson, III, Nashville, Tennessee, for the appellant, Dorothy L. Davis.

Thomas O. Helton and Sheri A. Fox, Chattanooga, Tennessee, for the appellees, J. Douglas Davis and Julie Ann Davis Griffin.

OPINION

This appeal requires us to construe an antenuptial agreement ("the agreement"). The facts relevant to our disposition of this appeal are undisputed. Plaintiff/Appellant, Ms. Dorothy L. Davis (Ms. Davis), a resident of Florida, and her late husband, J. D. Davis (Mr. Davis), a domiciliary of Tennessee, met in the spring of 1989 and married in July 1990. At the time of their marriage, Mr. Davis was 75 years of age and Ms. Davis was 66 years of age. Both Mr. Davis and Ms. Davis had been married previously, and both had children from their previous marriages. They were engaged for over a year before marrying, and their wedding date was postponed at least once. At the time of their marriage, both were in good health and were comfortable financially. They lived in Nashville, Tennessee, for six months of the year and in Florida for the remaining six months. Mr. Davis remained domiciled in Tennessee. Mr. Davis and Ms. Davis executed their antenuptial agreement at the offices of Mr. Davis' legal counsel in Florida on July 19, 1990, one day before their marriage. The agreement was notarized by a Florida notary.

The agreement executed by Mr. Davis and Ms. Davis provided, *inter alia*:

> 2. WAIVER OF RIGHT OF ELECTION. Each of the parties waives and releases any rights as surviving spouse to elect to take against the other's will, whether heretofore or hereafter made. This provision shall constitute a waiver and release of the right of election in accordance with the requirements of the Estates, Powers and Trusts Law of the State of Florida or of the

> same or similar law of any other jurisdiction which may be applicable.
>
> 3. RELEASE OF MARITAL RIGHTS. Each of the parties hereby waives and releases all rights and interest, statutory or otherwise, including by [sic] not limited to homestead, dower, spouse's allowance, statutory allowance, distribution in intestacy, and right of election to take against the will of each other which they might acquire as the wife, widow, husband, spouse, heir-at-law, next of kin, or distributee of each other, in their property, owned by them at the time of the marriage or acquired by them at any time thereafter.

Mr. Davis died on May 9, 2002, and his Will was admitted to probate in Tennessee on May 15, 2002. In December 2002, Ms. Davis filed petitions for elective share, homestead, exempt property, and a year's support allowance against the estate of Mr. Davis ("the Estate"). The Estate moved for summary judgment, arguing that Ms. Davis was not entitled to elect against Mr. Davis' Will under the antenuptial agreement. In her response, Ms. Davis argued the agreement was invalid and that she was, therefore, entitled to exercise her right to elective share, homestead, exempt property, and a year's support allowance.

The probate court determined that, under Tennessee's choice of law provisions, Florida law applied to the agreement. It further found the agreement to be valid and enforceable under Florida law. The probate court entered summary judgment for the Estate in April 2003, holding that, in light of the antenuptial agreement, Ms. Davis is not a "surviving spouse" within the meaning of section 31-4-101, Tennessee Code Annotated. Ms. Davis appeals.

Issues Presented

Ms. Davis presents the following issues, as we re-state them, for review by this Court:

(1) Whether the trial court erred by determining the antenuptial agreement is governed by Florida law;

(2) Whether the trial court erred by awarding summary judgment to the Estate where a genuine issue of material facts [sic] exists regarding whether the antenuptial agreement was a product of duress;

(3) Whether the trial court erred by awarding summary judgment to the Estate when enforcing it violates Tennessee public policy.

Standard of Review

Antenuptial agreements are enforceable as contracts. Tenn. Code Ann. § 36-3-501(2001). Contract interpretation is a matter of law which we review *de novo*, with no presumption of correctness afforded to the trial court. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999); Tenn. R. App. P. 13(d). We also review an award of summary judgment *de novo*, with no presumption of correctness. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 534 (Tenn. 2002).

Summary judgment is appropriate only when the moving party can demonstrate that there are no disputed issues of material fact, and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). The party moving for summary judgment must affirmatively negate an essential element of the nonmoving party's claim, or conclusively

establish an affirmative defense. *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998).

When a party makes a properly supported motion for summary judgment, the burden shifts to the nonmoving party to establish the existence of disputed material facts. *Id.* A mere assertion that the nonmoving party has no evidence does not suffice to entitle the moving party to summary judgment. *Id.* In determining whether to award summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Staples v. CBL & Assocs.*, 15 S.W.3d 83, 89 (Tenn. 2000). The court should award summary judgment only when a reasonable person could reach only one conclusion based on the facts and the inferences drawn from those facts. *Id.* Summary judgment is not appropriate if there is any doubt about whether a genuine issue of material fact exists. *McCarley*, 960 S.W.2d at 588.

Analysis

Absent a contractual choice of law provision, Tennessee courts apply the *lex loci* rule to contract causes of action. *Solomon v. FloWarr Mgmt.*, 777 S.W.2d 701, 704-05 (Tenn. Ct. App. 1989). Accordingly, the substantive law of the state in which the contract was executed governs disputes arising from the contract. *Id.* An exception to this general rule is often made when the contract is to be performed in another state and the parties envision performance in accordance with that state's laws. *Id.* at n5. The primary consideration to be made in determining whether the exception applies is whether the contract was made "in good faith with reference to the law of some other

state," or "with [a] view to" the other state. *Ohio Cas. Ins. Co. v. Travelers Indem. Co.*, 493 S.W.2d 465, 466-67 (Tenn.1973) (quoting *First Am. Nat'l Bank of Nashville v. Automobile Ins. Co.*, 252 F.2d 62 (6th Cir. Tenn.1958)). The intent of the parties in this regard is to be "gathered from the terms of the instruments and all of the attending circumstances." *Id.*

The agreement before us in this case contains no choice of law provision. Thus, absent a reason for exception, the *lex loci* rule applies and this agreement is to be construed under Florida law. Ms. Davis submits, however, that a genuine issue of material fact exists regarding whether the parties intended that the agreement would be construed under Tennessee or Florida law.

Although Mr. Davis remained a domicile of Tennessee and identified Tennessee as his residence in tax returns and in his Will, there is nothing in this record to suggest that Mr. Davis intended that this agreement would be construed under Tennessee law. Mr. Davis entered into the agreement while in Florida; he entered into the agreement with a Florida domiciliary; the agreement was prepared by Florida legal counsel; during the marriage, Mr. Davis resided in Florida for one-half of each year. Additionally, Florida law is the only law specifically referenced in the agreement. Further, there is nothing in the record to suggest Ms. Davis believed the agreement would be construed under Tennessee law at the time she entered into it. Thus, absent some reason for exception, the *lex loci* rule would apply to this agreement, and it would be governed by Florida law.

Ms. Davis submits, however, that this contract is not enforceable because it violates Tennessee public policy. In

general, parties are free to contract under binding terms unless contrary to an overriding social policy. *Planters Gin Co. v. Federal Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 892 (Tenn. 2002). Thus, regardless of the generally applicable *lex loci* rule of contracts, courts will apply Tennessee law under circumstances where applying the law of a sister jurisdiction would contravene a strong public policy of Tennessee. *Bowman v. Price*, 226 S.W. 210, 214 (Tenn. 1920); *Robinson Prop. Group, LP v. Russell*, No. W2000-00331-COA-R3-CV, 2000 WL 331913 71, at *3 (Tenn. Ct. App. Nov. 22, 2000) (*no perm. app. filed*). A contract which violates Tennessee public policy will not be enforceable in Tennessee, although it is enforceable in the state in which it was executed. *Martin v. Dealers Transp. Co.*, 342 S.W.2d 245, 249 (Tenn. Ct. App. 1961).

Florida and Tennessee law governing antenuptial agreements differ in at least one important respect. In Tennessee, antenuptial agreements are enforceable as contracts if they have been entered into "freely, knowledgeably and in good faith without exertion of duress or undue influence upon either spouse." Tenn. Code Ann. § 36-3-501(2001); *Bratton v. Bratton*, 136 S.W3d 595, 599 (Tenn. 2004). Thus, to be valid in Tennessee, an antenuptial agreement requires prior adequate disclosure and the absence of undue influence or overreaching. *Bratton*, 136 S.W.3d at 599. A party seeking to enforce an antenuptial agreement in Tennessee must prove, by a preponderance of the evidence, that the agreement was executed after

> full and fair disclosure of the nature, extent and value of his or her holdings was provided to the spouse seeking to avoid the agreement, or that disclosure was unnecessary because the spouse seeking to avoid the agreement had independent

> knowledge of the full nature, extent, and value of the proponent spouse's holdings.

Randolph v. Randolph, 937 S.W.2d 815, 817 (Tenn. 1996).

Tennessee applies the standard enunciated in *Randolph* in the probate context, as well as in the marriage dissolution context. *See In Re Estate of Miller*, C.A. No. 88-316-II, 1989 WL 19921, at *2 (Tenn. Ct. App. March 8, 1989). In *Estate of Miller*, this Court affirmed the judgment of the probate court setting aside the terms of an antenuptial agreement waiving the spouse's marital rights, including a year's support, exempt property, homestead and a distributive share of the net estate. We held the agreement was invalid where the agreement was not entered into freely, knowledgeably and in good faith after full and fair disclosure. *Id.*

Under Florida law, however, an antenuptial agreement may be held valid in the probate context even when executed under conditions which would render it invalid in a marriage dissolution action. *Weintraub v. Weintraub*, 417 So.2d 629, 630 (Fla. 1982). The Florida Code provides:

> **Waiver of Spousal Rights.**
>
> (1) The rights of a surviving spouse to an elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate or any of those rights, may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party in the presence of two subscribing witnesses. The requirement of witnesses shall be applicable only to contracts, agreements, or waivers signed by Florida residents after the effective date of this

law. Any contract, agreement, or waiver executed by a nonresident of Florida, either before or after this law takes effect, is valid in this state if valid when executed under the laws of the state or country where it was executed, whether or not he or she is a Florida resident at the time of death. Unless the waiver provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse, or a complete property settlement entered into after, or in anticipation of, separation, dissolution of marriage, or divorce, is a waiver of all rights to elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate, by the waiving party in the property of the other and a renunciation by the waiving party of all benefits that would otherwise pass to the waiving party from the other by intestate succession or by the provisions of any will executed before the written contract, agreement, or waiver.

(2) Each spouse shall make a fair disclosure to the other of that spouse's estate if the agreement, contract, or waiver is executed after marriage. No disclosure shall be required for an agreement, contract, or waiver executed before marriage.

(3) No consideration other than the execution of the agreement, contract, or waiver shall be necessary to its validity, whether executed before or after marriage.

Fla. Stat. Ann. § 732.702(2002). Thus, in the Florida probate context, an antenuptial agreement to waive the right of election is valid even in the absence of full and fair

disclosure of the estate. A fair disclosure is required only when such an agreement is executed after marriage.

As we consider whether enforcing the agreement as valid under Florida law would violate Tennessee public policy, we must consider the history of Florida law governing antenuptial agreements. The Supreme Court of Florida addressed the validity of antenuptial agreements in the probate context in *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla. 1962). The *Del Vecchio* court observed:

> The relationship between the parties to an antenuptial agreement is one of mutual trust and confidence. Since they do not deal at arm's length they must exercise a high degree of good faith and candor in all matters bearing upon the contract.

Del Vecchio, 143 So.2d at 21. In consideration of this confidential relationship, the court held that, in the probate context:

> A valid antenuptial agreement contemplates a fair and reasonable provision therein for the wife, or, absent such provision, a full and frank disclosure to the wife, before the signing of the agreement, of the husband's worth, or, absent such disclosure, a general and approximate knowledge by her of the prospective husband's property. The term 'approximate' is, for this purpose, held synonymous with 'near', 'close to' or 'approaching'.
>
> If the provision made by the agreement is not fair and reasonable then it should be made to appear that the wife, when she signed, had some understanding of her rights to be waived by the agreement. In any event she must have signed

> freely and voluntarily, preferably, but not necessarily a required pre-requisite, upon competent and independent advice.

Id. at 20. In *Posner v. Posner*, the Supreme Court of Florida held the *Del Vecchio* standard of fairness of provision or knowledge of the estate was applicable to determine the validity of antenuptial agreements in marriage dissolution actions. *Posner v. Posner*, 233 So.2d 381 (Fla. 1970).

In 1974, however, the Florida legislature enacted current section 732.702(2), changing the *Del Vecchio* rule as it applied to the probate context. *Weintraub*, 417 So.2d 629, 630 (Fla. 1982). Accordingly, under Florida law, an antenuptial agreement is valid in the probate context even absent disclosure or independent knowledge of the estate of the other spouse. *Id.* The Florida statute applies only in the probate context, however, and the *Weintraub* court rejected Appellant's argument that, for public policy reasons, the same rule should apply in marital dissolution actions. *Id.* at 631. The *Weintraub* court observed that the Florida legislature had made a policy determination when it revised the *Del Vecchio* rule in the probate context, and that it was within the province of the legislature to revise the rule, if it saw fit, in the dissolution context. *Id.* The court further stated, "[t]his Court, however, believes that the *Posner* decision serves an important function in protecting prospective spouses from being bound by unfair agreements[.]" *Id.*

Unlike the Florida legislature, the Tennessee legislature has made no distinction or exception for antenuptial agreements which ultimately are construed in the probate context. In Tennessee, an antenuptial agreement must be entered into "freely, knowledgeably and in good faith

without exertion of duress or undue influence upon either spouse" in order to be valid in any context. Tenn. Code Ann. § 36-3-501(2001). The courts of Tennessee, moreover, have applied the standard with the same rigor in both the probate and dissolution contexts. *See, e.g., In Re Estate of Miller*, C.A. No. 88-316-II, 1989 WL 19921, at *2 (Tenn. Ct. App. March 8, 1989).

In *Bratton v. Bratton*, 136 S.W.2d 595 (Tenn. 2004), the Tennessee Supreme Court recently reiterated the philosophy which guides the courts of this state when considering agreements entered into between spouses. In considering a postnuptial agreement, the *Bratton* court stated, "[b]ecause of the confidential relationship which exists between husband and wife, postnuptial agreements are [like antenuptial agreements] . . . subjected to close scrutiny by the courts to ensure that they are fair and equitable." *Bratton*, 136 S.W.3d at 601. The court observed that "a fiduciary duty of the highest degree" is imposed in transactions between spouses. *Id.* (quoting 41 C.J.S. *Husband & Wife* § 87 (1991)). The *Bratton* court emphasized:

> While it is lawful and not against public policy for husband and wife to enter into such contracts, yet they are not dealing with each other as strangers at arm's length. The relationship of husband and wife is one of special confidence and trust, requiring the utmost good faith and frankness in their dealings with each other. . . . Transactions of this character are scrutinized by the courts with great care, to the end that no unjust advantage may be obtained by one over the other by means of any oppression, deception, or fraud. Courts of equity will relieve against any unjust advantage procured by any such means, and less

> evidence is required in such cases to establish the fraud, oppression, or deception than if the parties had been dealing at arm's length as strangers. . . .

Id. (quoting *In re Estate of Gab*, 364 N.W.2d 924, 926 (S.D.1985) (quoting *Keith v. Keith*, 37 S.D. 132, 156 N.W. 910, 911 (1916))).

Clearly, in Tennessee, the marriage relationship is regarded as one of utmost confidence. Accordingly, it is the public policy of this state that agreements entered into between spouses or, in the case of antenuptial agreements, prospective spouses, are enforceable only if they are executed in good faith, knowledgeably, and without duress. *Id.*; Tenn. Code Ann. § 36-3-501 (2001). This "highest degree" of fiduciary duty is required in light of the confidential relationship existing between the parties at the time the agreement is made. The fact that a term of the agreement takes effect after the death of one spouse, rather than upon a dissolution of the marriage, does not change the circumstances existing at the time the agreement was executed by the parties.

Tennessee's requirements for antenuptial agreements have been developed in light of the unique and confidential nature of the marriage relationship. "An engagement to marry creates a confidential relation between the contracting parties and an antenuptial agreement contract entered into after the engagement and during its pendency must be attended by the utmost good faith[.]" *Bratton*, 136 S.W.3d at 601 (quoting *Baker v. Baker*, 142 S.W.2d 737, 745 (Tenn. 1940)). Borrowing the now famous words of Judge Cardozo, the parties to an antenuptial agreement are "coadventures, subject to fiduciary duties akin to those of partners . . . the punctilio of an honor the most sensitive, is

then the standard" which we shall apply to their agreements. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). The relationship existing at the time the agreement was executed is not altered by the context in which enforcement is sought.

The public policy of this state is found in our constitution, statutes, judicial decisions, and common law. *Alcazar v. Hayes*, 982 S.W.2d 845, 851 (Tenn. 1998). It is primarily within the function of the legislature to determine public policy, although the judiciary may do so in the absence of a constitutional or statutory directive. *Id.* Antenuptial agreements generally are favored by public policy. *Bratton*, 136 S.W.3d 599. However, the public policy of this state, as established by the legislature and enforced by the courts, requires that, in light of the confidential relationship between prospective spouses, antenuptial agreements must be *executed* in utmost good faith, knowledgeably, with full and fair disclosure, and without duress. Unlike the Florida legislature, the Tennessee legislature has not altered the rules governing the execution of antenuptial agreements when enforcement is in the probate context.

At the time he entered into the agreement, Mr. Davis was a domiciliary of Tennessee. He remained a domiciliary of Tennessee, and thus, upon his death, his Will was subject to probate in Tennessee courts. The parties to this action do not dispute that the Davises' antenuptial agreement was entered into by the parties without full and fair disclosure. Further, the Estate does not contend that Ms. Davis had independent knowledge of Mr. Davis' estate when the agreement was executed. Thus, in this case, the Estate seeks to enforce a contractual term which violates Tennessee public policy in a probate proceeding which could occur only in Tennessee.

As a matter of public policy, Tennessee requires full and fair disclosure. This policy has been formed by the legislature and reinforced by the courts of this state. It is a policy developed in light of the unique and confidential nature of the marital relationship, and serves to promote the highest degree of fiduciary duty between spouses. With all due respect to the legislature of Florida, section 732.702 of the Florida code violates a substantially important public policy of the State of Tennessee. Therefore, we decline to apply the *lex loci* rule to this agreement. The agreement will be construed under Tennessee substantive law. This holding is dispositive of this appeal and the issue of duress is pretermitted.[1]

Holding

In light of the foregoing, we hold the antenuptial agreement executed by Ms. Davis and the late Mr. Davis is unenforceable in Tennessee. Accordingly, we reverse the award of summary judgment to the Estate and remand this action for further proceedings consistent with this opinion. Costs of this appeal are taxed to the Appellees, J.

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[1] Although our holding on the issue of public policy makes it unnecessary for us to address the issue of duress, we note that the record and Appellant's brief create confusion regarding the date of the Davises' marriage. This fact would have been important in our consideration of duress. We note, however, that counsel for the Appellees informs the Court: "The Record below reflects some confusion over the date of marriage; however, the marriage license and antenuptial agreement show that the parties were married in 1990." We highly commend Appellees' counsel for their candor and forthrightness to this Court.

Douglas Davis and Julie Ann Davis Griffin, Co-Executors, for which execution may issue if necessary.

/s/ David R. Farmer
DAVID R. FARMER, JUDGE

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 3, 2004 Session

IN RE: THE ESTATE OF J. D. DAVIS, DECEASED

Circuit Court (Probate Division) for
Davidson County
No. 02P859

No. M2003-02614-COA-R3-CV

JUDGMENT

(Filed Sep. 02, 2004)

This cause came on to be regularly heard and considered by this Court, and for the reasons stated in the Opinion of this Court, of even date, it is Ordered:

1. The judgment of the trial court is reversed and remanded for further proceedings consistent with this opinion.

2. Costs of this appeal are taxed against the appellees J. Douglas Davis and Julie Ann Davis Griffin, Co-Executors, for which execution may issue if necessary.

PER CURIAM

IN THE SEVENTH CIRCUIT COURT
(PROBATE DIVISION)
DAVIDSON COUNTY,
TWENTIETH JUDICIAL DISTRICT
STATE OF TENNESSEE

DOROTHY L. DAVIS, Petitioner/Surviving Spouse, v. J. DOUGLAS DAVIS and, JULIE ANN DAVIS GRIFFIN, Co-executors under the Last Will and Testament of J.D. Davis, deceased, Respondents.	)	No. 02P859

ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

(Filed Apr. 23, 2003)

On March 28, 2003, this Court heard oral argument on the Motion for Summary Judgment filed by J. Douglas Davis and Julie Ann Davis Griffin ("Respondents"). Based upon the pleadings, argument of counsel, and the entire record in this case, this Court finds as follows:

Dorothy L. Davis ("Petitioner") was a resident of Florida at the time of her marriage to J. D. Davis ("Decedent"); Petitioner and Decedent's marriage license was issued by the State of Florida; Petitioner and Decedent's marriage occurred in Florida; and Petitioner and Decedent lived in Florida for at least part of the time during their marriage;

Under Tennessee choice of law provisions, the substantive law of the State of Florida applies to determine the validity of the Antenuptial Agreement ("Agreement") executed by Petitioner and Decedent;

The Agreement is valid and enforceable under Florida law;

Because Petitioner and Decedent entered into a valid and enforceable antenuptial agreement, Petitioner is not a "surviving spouse" within the meaning of Section 31-4-101, *Tennessee Code Annotated*;

Because Petitioner is not a "surviving spouse," she is not entitled to an elective share, homestead, exempt property, or a year's support allowance from the Estate of J. D. Davis; and

The Agreement constitutes a complete waiver by Petitioner of any interest in the Estate of J. D. Davis beyond that which is provided for under the terms of the Last Will and Testament of J. D. Davis.

Based upon the foregoing findings of fact and conclusions of law, the pleadings, argument of counsel, and the entire record, this Court finds that there is no genuine issue of material fact with regard to Petitioner's claims for elective share, homestead, exempt property, and a year's support allowance, and that Respondents are entitled to summary judgment on those claims as a matter of law.

Accordingly, Respondents' Motion for Summary Judgment is **GRANTED** and it is hereby

ORDERED that Petitioner's claims for elective share, homestead, exempt property, and a year's support allowance and all matters currently pending before this Court

concerning those claims be dismissed with prejudice. It is further

ORDERED that costs be taxed against Petitioner.

Entered this 23, day of April, 2003.

/s/ Frank G. Clement, Jr.
Honorable Frank G. Clement, Jr.

APPROVED FOR ENTRY:

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been hand delivered and mailed, postage prepaid, to the following, this 14 day of April, 2003.

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By: /s/ Thomas O. Helton

C-1

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: THE ESTATE OF J. D. DAVIS

No. M2003-02614-SC-R11-CV

ORDER

(Filed Feb. 28, 2005)

Upon consideration of the application of J. Douglas Davis and Julie Ann Davis Griffing [sic] for permission to appeal and the record before us, the application is denied.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: THE ESTATE OF J. D. DAVIS

No. M2003-02614-SC-R11-CV

ORDER

(Filed May 2, 2005)

Upon consideration of the Petition for Rehearing of the February 28, 2005, order denying the application for permission to appeal of J. Douglas Davis and Julie Ann Davis Griffin and the record before us, the petition is denied.

The Motions of Dorothy L. Davis to strike petition for rehearing and of J. Douglas Davis and Julie Ann Davis Griffin to strike the motion to strike petition for rehearing are denied.

PER CURIAM

U.S. Const. Art. IV § 1

Section 1. Full Faith and Credit

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

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28 U.S.C. § 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Tenn. Code Ann. § 36-3-501 (2005)

36-3-501. Enforcement of antenuptial agreements

Notwithstanding any other provision of law to the contrary, except as provided in § 36-3-502, any antenuptial or prenuptial agreement entered into by spouses concerning property owned by either spouse before the marriage which is the subject of such agreement shall be binding upon any court having jurisdiction over such spouses and/or such agreement if such agreement is determined, in the discretion of such court, to have been entered into by such spouses freely, knowledgeably and in good faith and without exertion of duress or undue influence upon either spouse. The terms of such agreement shall be enforceable by all remedies available for enforcement of contract terms.

Fla. Stat. Ann. § 732.702. Waiver of spousal rights

(1) The rights of a surviving spouse to an elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate or any of those rights, may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party in the presence of two subscribing witnesses. The requirement of witnesses shall be applicable only to contracts, agreements, or waivers signed by Florida residents after the effective date of this law. Any contract, agreement, or waiver executed by a nonresident of Florida, either before or after this law takes effect, is valid in this state if valid when executed under the laws of the state or country

where it was executed, whether or not he or she is a Florida resident at the time of death. Unless the waiver provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse, or a complete property settlement entered into after, or in anticipation of, separation, dissolution of marriage, or divorce, is a waiver of all rights to elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate, by the waiving party in the property of the other and a renunciation by the waiving party of all benefits that would otherwise pass to the waiving party from the other by intestate succession or by the provisions of any will executed before the written contract, agreement, or waiver.

(2) Each spouse shall make a fair disclosure to the other of that spouse's estate if the agreement, contract, or waiver is executed after marriage. No disclosure shall be required for an agreement, contract, or waiver executed before marriage.

(3) No consideration other than the execution of the agreement, contract, or waiver shall be necessary to its validity, whether executed before or after marriage.

ANTE-NUPTIAL AGREEMENT

AGREEMENT made this 19th day of July, 1990 between DOROTHY TAYLOR of West Palm Beach, Fl, and J. D. DAVIS of Nashville, Tennessee.

WHEREAS the parties to this agreement intend to be married in the immediate future, and

WHEREAS each of the parties owns individually real and/or personal property, the nature and extent of the holdings of each party having been disclosed to the other, and

WHEREAS the parties desire that all property now owned or hereafter acquired by each of them shall, for testamentary disposition, be free from any claim of the other that may arise by reason of their contemplated marriage.

It is therefore agreed:

1. PROPERTY TO BE SEPARATELY OWNED. After the solemnization of the marriage between the parties, each of them shall separately retain all rights in his or her own property, whether now owned or hereafter acquired, and each of them shall have the absolute and unrestricted right to dispose of such separate property, free from any claim that may be made by the other by reason of their marriage, and with the same effect as if no marriage had been consummated between them.

2. WAIVER OF RIGHT OF ELECTION. Each of the parties waives and releases any rights as surviving spouse to elect to take against the other's will, whether heretofore or hereafter made. This provision shall constitute a waiver and release of the right of election in accordance with the

requirements of the Estates, Powers and Trusts Law of the State of Florida or of the same or similar law of any other jurisdiction which may be applicable.

3. RELEASE OF MARITAL RIGHTS. Each of the parties hereby waives and releases all right and interest, statutory or otherwise, including but not limited to homestead, dower, spouse's allowance, statutory allowance, distribution in intestacy, and right of election to take against the will of each other which they might acquire as the wife, widow, husband, spouse, heir-at-law, next of kin, or distributee of each other, in their property, owned by them at the time of the marriage or acquired by them at any time thereafter.

4. SEPARATE PROPERTY. Except as herein otherwise provided each of the parties shall have the absolute right to manage, dispose of, or otherwise deal with any property now separately owned, or hereafter separately acquired, in any manner whatsoever.

5. TRANSFERS BETWEEN THE PARTIES. Notwithstanding the provisions of this agreement, either party shall have the right to transfer or convey to the other any property or interest therein which may be lawfully conveyed or transferred during his or her lifetime or by will or otherwise upon death, and neither party intends by this agreement to limit or restrict in any way the right and power to receive any such transfer or conveyance from the other. However, the parties acknowledge that no promises of any kind have been made by either of them to the other with respect to any such right.

6. Each party during his or her lifetime shall keep and retain sole ownership, control and enjoyment of all his

or her property, real and personal, free and clear of any claim of the other.

7. WAIVER OF ALIMONY. Each of the parties hereby waives and releases all right and interest, statutory or otherwise, that they may now have, or in the future have, for any alimony.

8. NECESSARY DOCUMENTS. Each party shall, upon the request of the other, execute, acknowledge, and deliver any additional instruments that may be reasonably required to carry the intention of this agreement into effect, including such instruments as may be required by the laws of any jurisdiction, now in effect or hereafter enacted, which may affect the property right of the parties as between themselves or with others.

9. EFFECTIVE DATE. This agreement shall take effect only upon the solemnization of the marriage now contemplated by the parties.

10. CONSIDERATION. The consideration for this agreement is the marriage contemplated by the parties, and the mutual promises contained therein.

11. COMPLETENESS. This agreement contains the entire understanding of the parties, and no representations or promises have been made except as contained herein.

12. BENEFIT. This agreement shall bind and inure to the benefit of the parties and their respective legal representatives, successors, and assigns.

IN WITNESS WHEREOF the parties have signed, sealed and acknowledged this agreement.

/s/ Dorothy Tyalor (L.S.)
Dorothy Taylor

J.D. Davis (L.S.)
J.D. Davis

WITNESSES:

/s/ J[Illegible] Nemez

/s/ Ray Greenberg

STATE OF FLORIDA

COUNTY OF PALM BEACH

I HEREBY CERTIFY that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgments, DOROTHY TAYLOR and J.D. DAVIS, to me well known and known to me to be the individuals described in and who executed the foregoing instrument; and they acknowledged before me that they executed the same freely and voluntarily for the purposes therein expressed.

WITNESS my hand and official seal at West Palm Beach, County of Palm Beach, State of Florida, this 19th day of July, 1990.

/s/ J[Illegible] Nemez
Notary Public

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. DEC 27, 1990
BONDED THRU GENERAL INS. UND.

(2)

No. 05-162

Supreme Court, U.S.
FILED
SEP 30 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ESTATE OF J. D. DAVIS AND J. DOUGLAS DAVIS AND JULIE ANN DAVIS GRIFFIN, CO-EXECUTORS,

Petitioners,

v.

DOROTHY L. DAVIS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Tennessee, Middle Section At Nashville

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners Have Satisfied the Jurisdictional Requirements of 28 U.S.C. § 1257(a).

II. Whether Petitioners Have Complied with the Mandate of Supreme Court Rule 14.1(g)(i).

III. Whether Tennessee Has a Significant Aggregation of Contacts with This Matter So That Application of Its Law Is Constitutionally Permissible Under the Court's Recent Unanimous Decision in *Franchise Tax Board v. Hyatt*.

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B – Letter from Richard Bird to Overton Thompson III, dated July 20, 2005 ..... B-1

C – Order of Tennessee Court of Appeals, Middle Division, dated August 26, 2005 ..... C-1

D – Complaint Filed by Petitioners in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida on July 19, 2005 ..... D-1

E – Memorandum Opinion and Order of the Seventh Circuit Court of Davidson County, Tennessee (Probate Division), dated August 26, 2005 ..... E-1

F – Respondent's Motion to Enlarge Time to Respond to Complaint, filed in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida on September 27, 2005 ..... F-1

JURISDICTION

Because of Petitioners' failure to comply with 28 U.S.C. § 1257(a) and Supreme Court Rule 14.1(g)(i), this Court lacks jurisdiction.

STATEMENT OF THE CASE

This case raises no substantial federal question. No matter of pressing national concern is involved. At issue is simply the question of what portion of the Tennessee estate of J.D. Davis, a Tennessee domiciliary, should be distributed to his children from his first marriage and what portion should be distributed to his widow, a Tennessee resident at his death and to whom he was married for nearly twelve years until he died on May 9, 2002. The children from the prior marriage are co-executors of Mr. Davis' estate and are Petitioners. Dorothy Davis, J.D. Davis' widow, is the Respondent to the petition.

Petitioners argued in the state courts of Tennessee that Mrs. Davis waived the statutory rights granted by Tennessee law to a surviving spouse by executing an antenuptial agreement in Florida on July 19, 1990. They asserted that Tennessee is required to apply its usual choice of law contract rule of *lex loci contractus*, unless fundamental public policies of Tennessee would be offended. Petitioners allowed that under the Full Faith and Credit Clauses of the United States and Tennessee Constitutions that Tennessee could apply its own law if its public policy would be truly offended. However, they contended that Tennessee public policy had not been truly offended. Accordingly, the public policy exception to *lex loci contractus* was not justified in this case and Florida law had to be applied. Unlike Tennessee law, Florida law does not require full and fair disclosure prior to the execution of an antenuptial agreement.

Mrs. Davis argued that the antenuptial agreement was not valid because there is a fundamental and well-established Tennessee public policy that bars a waiver of a surviving spouse's statutory rights unless those rights are "knowledgeably" waived. This public policy is embodied in Tenn. Code Ann. § 36-3-501 as well as numerous Tennessee Supreme Court and Court of Appeals decisions. As there was no disclosure by Mr. Davis of his finances and Mrs. Davis had no independent knowledge, the requirement that the waiver be made "knowledgeably" had not been satisfied.

Mrs. Davis also claimed that she had signed the antenuptial agreement under duress, a basis for invalidity under both Tennessee and Florida law. She had been taken to the office of decedent's attorney just one day before the marriage, did not have her own attorney present, was told by the decedent to trust him and that "there was nothing to worry about," and after being coerced into signing had not seen the agreement or a copy again until shortly before her husband's death more than eleven years later. R. vol. II, at 170-72.

The Seventh Circuit Court (Probate Division), Davidson County, Tennessee (the "Probate Court"), on a motion for summary judgment by Petitioners, held in favor of Petitioners. Pet. App. B-1 to B-4. On appeal, the Tennessee Court of Appeals unanimously reversed and remanded for further proceedings consistent with its opinion. Pet. App. A-1 to A-17. The Tennessee Supreme Court subsequently denied Petitioners' petition for permission to appeal, Pet. App. C-1, and also denied their petition for a rehearing of the denial for permission to appeal. Pet. App. D-1.

The opinion of the Tennessee Court of Appeals makes clear that antenuptial agreements are treated differently under Tennessee law than are ordinary commercial contracts. The public policy of the state seeks to encourage

"the highest degree of fiduciary duty between spouses," Pet. App. A-15, and requires, in pursuit of that policy, that antenuptial agreements "must be *executed* in utmost good faith, knowledgeably, with full and fair disclosure, and without duress," Pet. App. A-14. Furthermore, Tennessee has a significant interest in the matter as "the Estate seeks to enforce a contractual term which violates Tennessee public policy in a probate proceeding which could occur only in Tennessee." *Id.*

In reaching its decision, the Tennessee Court of Appeals was not unmindful of or insensitive to the law of the sister state of Florida. The Court carefully analyzed the genesis of the unique approach of Florida, the only state in the country which requires a knowing waiver if statutory rights upon *divorce* are involved, but imposes no such requirement if a waiver of statutory rights is asserted in the *probate* context. The Court explained: "With all due respect to the legislature of Florida, section 732.702 of the Florida code violates a substantially important public policy of the State of Tennessee. Therefore, we decline to apply the *lex loci* rule to this agreement." Pet. App. A-15. Because of its decision on public policy grounds, the Court of Appeals held that the issue of duress was pretermitted. *Id.*

A review of the Record reveals that Tennessee has a significant aggregation of contacts with this matter. The decedent grew up in Tennessee, lived in Tennessee, and died a domiciliary of the state. Virtually his entire estate was situated in Tennessee at his death. Petitioners offered decedent's will for probate exclusively in Tennessee and sought appointment as his personal representatives solely in Tennessee and in no other state. At the time of decedent's death his surviving spouse, Mrs. Davis, was a resident of *Tennessee*. If the waiver at issue here is, indeed, invalid, then Mrs. Davis will be entitled to take a portion of her husband's *Tennessee* estate pursuant to

statutory rights granted by *Tennessee* law. If the waiver is valid, then Mrs. Davis will be denied statutory rights granted under *Tennessee* law to a surviving spouse of a *Tennessee* domiciliary decedent in that decedent's *Tennessee* estate. The waiver does not exist in a vacuum. It has no practical significance except as it affects how the *Tennessee* estate of a *Tennessee* domiciliary is distributed. Property in no other state will be affected. The waiver only impacts Tennessee's system of inheritance.

The current posture of this case leaves no doubt that review by this Court would be premature and beyond the Court's jurisdiction under 28 U.S.C. § 1257(a). Presently, there is no final judgment. There are pending state court proceedings in Tennessee as well as in Florida. Indeed, counsel for Petitioners has only recently admonished counsel for Mrs. Davis that "we do not agree that the claims of Dorothy Davis are finally resolved in her favor" and has explained that the production of certain documents did not waive "any rights claims, setoffs, counterclaims or other actions and recourses available to the Executors for the benefit of the Estate." Resp. App. A-1. In even more recent correspondence, counsel for Petitioners has reasserted in writing that Petitioners do not consider the claims finally resolved. Resp. App. B-1. Furthermore, by an Order dated August 26, 2005, the Tennessee Court of Appeals refused to exercise its discretion and withdraw its mandate so as to stay further proceedings pending this Court's consideration of the petition, as was requested by Petitioners. Resp. App. C-1. Accordingly, the parties are currently proceeding with discovery in the ongoing Tennessee litigation.

In addition to the ongoing proceedings in Tennessee, just ten days before filing their petition in this Court, Petitioners filed a complaint on July 20, 2005 in the Circuit Court for the Fifteenth Judicial Circuit of Palm Beach County, Florida. Resp. App. D-1 to D-9. The complaint